

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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VALERIE D. HUBBARD,

Plaintiff,

v.

DAY & ZIMMERMANN HAWTHORNE  
CORPORATION, a foreign corporation,

Defendant.

Case No. 3:12-cv-00681-MMD-VPC

ORDER

**I. SUMMARY**

Before the Court is Defendant Day & Zimmermann Hawthorne Corporation's Motion for Summary Judgment ("Motion"). (Dkt. no. 24.) The Court has reviewed Plaintiff's opposition (dkt. no. 25) and Defendant's reply (dkt. no. 26). For the reasons stated herein, the Motion is denied.

**II. BACKGROUND**

This dispute arises out of alleged employment discrimination under the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 1210, *et seq.* The following facts are undisputed.<sup>1</sup>

Defendant operates the Hawthorne Army Depot ("the Depot"), a live munitions storage facility, pursuant to a contract with the United States Army. (Dkt. no. 24-2 at 2.)

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<sup>1</sup>The facts are taken primarily from Plaintiff's deposition testimony (dkt. no. 24-4), and from the Complaint (dkt. no. 1) and certain exhibits attached to the parties' briefs that are not disputed.

1 For safety and security reasons, Defendant employs a full-time staff of security guards  
2 to protect the Depot at all times. (*Id.*; dkt. no. 24-4 at 7-8, 19.) Defendant's disciplinary  
3 policy calls for termination of those employees who are deemed to be a "no-call, no-  
4 show" (i.e., failure to report at their assigned work location and assigned time). (Dkt. no.  
5 24-2 at 2; dkt. no. 24-4 at 10.) However, employees who are asked to report back to the  
6 Depot's clinic ("Clinic") due to medical concerns are given two chances to report to the  
7 Clinic before they are terminated. (Dkt. no. 24-2 at 2-3.) According to Defendant, it gives  
8 two opportunities because it "recognizes that an employee with medical concerns may  
9 have other matters on their mind." (*Id.*)

10 Plaintiff Valerie D. Hubbard was employed with Defendant as a security guard at  
11 the Depot from November 2008 to November 9, 2009.<sup>2</sup> (Dkt. no. 24-4 at 25, 64.) She  
12 worked the graveyard shift. (*Id.*) On June 16, 2009, Plaintiff had a hysterectomy to treat  
13 early stages of uterine cancer. (Dkt. no. 24-4 at 32-33.) Plaintiff requested and was  
14 given time off work before the surgery. (*Id.* at 29.) Her physician, Dr. Beckman, advised  
15 her that she would need to take hormone supplements for the rest of her life since there  
16 was a chance that she may experience emotional issues after the complete  
17 hysterectomy. (*Id.* at 34-35.) In her postoperative visit on August 11, 2009, Dr. Beckman  
18 noted that she had no complaints with her supplements. (Dkt. no. 24-7.) Plaintiff  
19 returned to work on August 12, 2009. (Dkt. no. 24-4 at 38-41.) She felt fine at that time  
20 and was able resume her regular job duties. (*Id.*)

21 About a month later, in September, Plaintiff started to experience emotional  
22 problems, including anger issues and difficulty with concentration. (Dkt. no. 24-4 at 4,  
23 42-43.) She was concerned about her ability to perform her job safely given that her  
24 responsibilities involved providing security and she was provided with a firearm during  
25 her shift. (Dkt. no. 24-4 at 42-43.) Plaintiff's emotional health deteriorated such that on  
26 the evening of October 20, 2009, "it seemed like [she] broke," she "felt like [she] wanted

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27 <sup>2</sup>Plaintiff had been previously employed with Defendant, but was terminated and  
28 then rehired in November 2008. (Dkt. no. 24-4 at 24.)

1 to commit suicide, and [she] did not know what was wrong with [her].” (*Id.* at 5, 44-45.)  
2 Plaintiff discussed her concerns with one of her supervisors, Richard Bryant, who  
3 referred her to human resources to explore her options, which she did. (Dkt. no. 24-4 at  
4 47-52.)

5 The next morning, October 21, 2009, she saw Dr. Beckman and he suggested  
6 the emotional issues she was experiencing “were possibly” related to her menopausal  
7 status and her supplements. (*Id.* at 53; dkt. no. 24-7.) Dr. Beckman changed her  
8 medication and noted that he did not see any medical reason for her not to work. (Dkt.  
9 no. 24-7.)

10 After her appointment with Dr. Beckman, Mr. Bryant contacted her to relay that  
11 she should not come to work that evening but should report to the Clinic in the morning  
12 for a “Fitness for Duty” evaluation.<sup>3</sup> (*Id.* at 54.) Plaintiff agreed with Mr. Bryant’s request  
13 since she did not believe she could do her job at that time because of her emotional  
14 state. (*Id.*)

15 On October 22, 2009, Plaintiff reported to the Clinic and was seen by the Clinic  
16 doctor. (*Id.* at 56-57.) Plaintiff gave the doctor the background information about her  
17 mental state and the change in her hormone supplements. (*Id.*) The doctor told her to  
18 take time off since he did not believe, based on his observation of her mental state at  
19 that time, she could perform her duties. (*Id.*) Plaintiff was given the Clinic service  
20 provider form (“First Notice”) directing her to provide her doctor’s note to the Clinic on or  
21 before October 26, 2009. (Dkt. no. 24-8.) The First Notice further stated that a release  
22 form would be sent to Dr. Beckman and Plaintiff would be “off work until further notice.”

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25 <sup>3</sup>According to Plaintiff, if a supervisor believed that an employee should be  
26 examined to determine whether the employee is fit for duty, the supervisor would send  
27 the employee to the clinic where a doctor, who is employed with Defendant as an  
28 independent contractor, would examine the employee to determine whether or not the  
employee is fit to work. (Dkt. no. 24-4 at 10-12.) Mr. Bryant completed a “Fitness for  
Duty” form on October 21, 2009, stating that Plaintiff relayed that “she was going to  
request a leave of absence due to a medical condition resulting from recent surgery,  
causing extreme mood swings, making it difficult for her to work.” (Dkt. no. 25-1 at 53.)

1 (*Id.*) After leaving the Clinic on October 22, 2009, Plaintiff made an appointment to see  
2 Dr. Beckman on November 4, 2009. (Dkt. no. 24-4 at 60, 63.)

3 Plaintiff did not report to the clinic on October 26, 2009.<sup>4</sup> (Dkt. no. 24-4 at 60-62.)  
4 Defendant sent Plaintiff a second Clinic service provider form dated October 27, 2009  
5 (“Second Notice”) via certified mail, which she received at the end of October. (*Id.*; dkt.  
6 no. 24-9.) The Second Notice informed Plaintiff that she would need to provide her  
7 doctor’s note to the clinic on or before November 3, 2009. (Dkt. no. 24-9.) It further  
8 indicated: “failed to check in with clinic on 10-26-09. Must check in by 11-3-09 with Dr.  
9 note.” (*Id.*) Plaintiff contacted the Clinic the day she received the Second Notice. (Dkt.  
10 no. 24-4 at 61.) According to Plaintiff, she did not report to the Clinic by November 3,  
11 2009, because the clinic administrator told her not to worry about the date. (*Id.* at 62;  
12 dkt. no. 25-1 at 19.)

13 At her scheduled appointment with Dr. Beckman on November 4, 2009, Plaintiff  
14 asked Dr. Beckman to release her to return to work. (Dkt. no. 25-1 at 23, 55.) By that  
15 time, Plaintiff was responding to the new medication and was “feeling a little better.” (*Id.*  
16 at 23; dkt. no. 24-7 at 2.) Dr. Beckman released her to return to work starting on  
17 November 5, 2009. (Dkt. no. 25-1 at 23, 55.) Plaintiff contacted Defendant’s clinic on the  
18 same day after her appointment with Dr. Beckman. (*Id.* at 23.) However, on November  
19 9, 2009, Plaintiff was informed Defendant has terminated her employment for violating  
20 its “no-call, no-show” policy. (*Id.* at 24-25; dkt. no. 24-4 at 64.)

21 The Complaint asserts under the “first claim for relief” disability discrimination  
22 under the ADA based on Defendant’s alleged failure to provide reasonable  
23 accommodation and termination of Plaintiff’s employment “for exercising her rights  
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25 <sup>4</sup>Plaintiff testified that she was not given any paperwork on October 22, 2009  
26 (dkt. no. 25-1 at 17), but it appears that she recanted during her deposition. Plaintiff  
27 later testified that she read the paperwork that the Clinic staff gave her on October 22,  
28 2009, and her friend who accompanied her to the Clinic also read the paperwork. (Dkt.  
no. 24-4 at 59.) Plaintiff also acknowledged that she knew, based on past experience  
that if taken off work after a Fitness for Duty exam, the employee has to report back to  
the Clinic at some future date. (*Id.* at 59-60.)

1 under the Act and because of her disability.” (Dkt. no. 1 at 3.) Defendant construes the  
2 Complaint as alleging disability discrimination and seeks summary judgment on this  
3 basis. Plaintiff’s response contends that her Complaint also alleges retaliation.

### 4 **III. LEGAL STANDARD**

5 The purpose of summary judgment is to avoid unnecessary trials when there is  
6 no dispute as to the facts before the court. *Nw. Motorcycle Ass’n v. U.S. Dep’t of Agric.*,  
7 18 F.3d 1468, 1471 (9th Cir. 1994). Summary judgment is appropriate when the  
8 pleadings, the discovery and disclosure materials on file, and any affidavits “show there  
9 is no genuine issue as to any material fact and that the movant is entitled to judgment  
10 as a matter of law.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986). An issue is  
11 “genuine” if there is a sufficient evidentiary basis on which a reasonable fact-finder  
12 could find for the nonmoving party and a dispute is “material” if it could affect the  
13 outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S.  
14 242, 248-49 (1986). Where reasonable minds could differ on the material facts at issue,  
15 however, summary judgment is not appropriate. *Warren v. City of Carlsbad*, 58 F.3d  
16 439, 441 (9th Cir. 1995). “The amount of evidence necessary to raise a genuine issue of  
17 material fact is enough ‘to require a jury or judge to resolve the parties’ differing  
18 versions of the truth at trial.’” *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 902 (9th Cir.  
19 1983) (quoting *First Nat’l Bank v. Cities Service Co.*, 391 U.S. 253, 288-89 (1968)). In  
20 evaluating a summary judgment motion, a court views all facts and draws all inferences  
21 in the light most favorable to the nonmoving party. *Kaiser Cement Corp. v. Fishbach &*  
22 *Moore, Inc.*, 793 F.2d 1100, 1103 (9th Cir. 1986).

23 The moving party bears the burden of showing that there are no genuine issues  
24 of material fact. *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982). “In  
25 order to carry its burden of production, the moving party must either produce evidence  
26 negating an essential element of the nonmoving party’s claim or defense or show that  
27 the nonmoving party does not have enough evidence of an essential element to carry its  
28 ultimate burden of persuasion at trial.” *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210

1 F.3d 1099, 1102 (9th Cir. 2000). Once the moving party satisfies Rule 56's  
2 requirements, the burden shifts to the party resisting the motion to "set forth specific  
3 facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256. The  
4 nonmoving party "may not rely on denials in the pleadings but must produce specific  
5 evidence, through affidavits or admissible discovery material, to show that the dispute  
6 exists," *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991), and "must do  
7 more than simply show that there is some metaphysical doubt as to the material facts."  
8 *Orr v. Bank of Am.*, 285 F.3d 764, 783 (9th Cir. 2002) (internal citations omitted). "The  
9 mere existence of a scintilla of evidence in support of the plaintiff's position will be  
10 insufficient." *Anderson*, 477 U.S. at 252.

#### 11 **IV. DISCUSSION**

##### 12 **A. Disability Discrimination**

13 Title I of the ADA prohibits "discriminat[ion] against a qualified individual on the  
14 basis of disability in regard to . . . discharge of employees . . . and privileges of  
15 employment." 42 U.S.C. § 12112(a) (2009). To establish a prima facie case of  
16 discrimination under the ADA, a plaintiff must show that she "(1) is disabled; (2) is  
17 'qualified' and (3) suffered an adverse employment action because of [her] disability."  
18 *Jefferson v. Time Warner Cable Enters. LLC*, 584 F.App'x. 520, 522 (9th Cir. 2014);  
19 *Allen v. Pac. Bell*, 348 F.3d 1113, 1114 (9th Cir. 2003). If a plaintiff satisfies her burden,  
20 the burden then shifts to the defendant to offer a legitimate business reason for the  
21 employment termination. *Snead v. Metropo. Property & Casualty Ins. Co.*, 237 F.3d  
22 1080, 1093 (9th Cir. 2001). Once a defendant articulates a legitimate reason for the  
23 termination, the burden shifts to the plaintiff to show that the reason is a pretext for  
24 discrimination. *Id.*

25 Defendant contends Plaintiff cannot satisfy any of the three elements to establish  
26 her prima facie case, and it has articulated a legitimate reason for Plaintiff's termination.  
27 Plaintiff disputes the contention that she did not suffer a covered disability and claimed  
28 the reason offered for her termination is a pretext for discrimination.

# 1                    1.        Covered Disability

2                Congress enacted the ADA Amendment Act of 2008 (“ADAAA”) to expand “the  
3 class of individuals who are entitled to protection under the ADA.” *Rohr v. Salt River*  
4 *Project Agric. Improvement and Power Dist.*, 555 F.3d 850, 853 (9th Cir. 2009). The  
5 definition of “‘disability’ was to be broadly construed and coverage will apply to the  
6 ‘maximum extent’ permitted by the ADA and the ADAAA.” *Id.* at 861.

7                The ADA contains three definitions of disability. 42 U.S.C. § 12102(1). Plaintiff is  
8 proceeding under the first definition — that she has “a physical or mental impairment  
9 that substantially limits one or more . . . major life activities.” 42 U.S.C. § 12102(1)(A).  
10 Under the ADA, “major life activities” cover working as well as “the operation of a major  
11 bodily function,” which includes endocrine functions. 29 C.F.R. § 1630.2(i)(1)(i)-(ii). “An  
12 impairment need not prevent, or significantly or severely restrict, the individual from  
13 performing a major life activity in order to be considered substantially limiting.” 29 C.F.R.  
14 § 1630.2(j)(1)(ii). Moreover, “the threshold issue of whether an impairment ‘substantially  
15 limits’ a major life activity should not demand extensive analysis.” 29 C.F.R. §  
16 1630.2(j)(1)(iii).

17                The Complaint alleges that the “medical procedure [hysterectomy] caused a  
18 hormonal imbalance in Plaintiff resulting in mood swings, emotional issues and failure to  
19 comprehend and focus all of which substantially limit Plaintiff’s daily life activities.” (Dkt.  
20 no. 1, ¶ 3.) In her response to interrogatories, Plaintiff stated that the hysterectomy  
21 “caused a change in her mood balance, an endocrine function, which in turn caused  
22 lack of control over emotions, adversely affected Plaintiff’s comprehension and ability to  
23 interact with others, with extreme mood swings, and caused insomnia with resulting  
24 fatigue.” (Dkt. no. 24-12 at 4.) She further claims that “[t]his is a chronic condition.”<sup>5</sup> (*Id.*)

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26                <sup>5</sup>Plaintiff testified that she stopped taking hormone supplements about six  
27 months after her termination because they were affecting her mood — making her  
28 “emotional” and feel “withdrawn.” (Dkt. no. 24-4 at 35-37.) She did not start to feel better  
until early 2011. (*Id.*)



1 Defendant argues that Plaintiff does not have a disability because the medical  
2 evidence does not support her claim that she experienced symptoms of hormonal  
3 imbalance. Defendant cites to the evidence that (1) Dr. Beckman only told Plaintiff she  
4 “may” have problems after her hysterectomy, (2) he released her to return to work on  
5 August 12, 2009, and (3) he told her on October 21, 2009 that her medication “could” be  
6 the cause of her problems or that her problems could “possibly” be related to her  
7 hysterectomy, but he could not be sure.<sup>6</sup> Defendant contends that one is left to  
8 speculate as to what Plaintiff’s disability might be since Dr. Beckman determined she  
9 did not have any physical disability and Plaintiff only offers her statement as to her  
10 emotional instability. Defendant’s argument is unavailing.

11 Defendant’s proffered evidence does not show that Dr. Beckman found Plaintiff  
12 did not experience emotional impairment. In fact, Dr. Beckman adjusted Plaintiff’s  
13 medication on October 22, 2012, because of Plaintiff’s symptoms.<sup>7</sup> Plaintiff testified that  
14 she began to experience mood swings in September, after she had been released to  
15 work for several weeks, and her emotional impairment worsened such that by October  
16 21, 2009, she had suicidal thoughts and did not believe she should continue to work.  
17 Defendant’s proffered records from Dr. Beckman do not dispute that Plaintiff  
18 experienced these impairment.

19 Plaintiff has offered evidence through her testimony that she has a physical  
20 impairment that affects major life activities, including working and the operation of her  
21 endocrine system. “At the summary judgment stage, ‘precedent does not require  
22 comparative or medical evidence to establish a genuine issue of material fact regarding

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23 <sup>6</sup>Defendant appears to suggest that just because a physician is not certain as to  
24 the reason for the symptoms that a patient experiences, the symptoms themselves  
25 cannot be disabling. This is absurd. Science does what it can, but not all of the  
mysteries of the human body have been solved. Sometimes a doctor cannot determine  
what causes a disabling symptom, but that does not mean the symptom does not exist.

26 <sup>7</sup>Defendant does not and cannot argue that because Plaintiff’s mental impairment  
27 could be treated with hormone supplements that she therefore does not have a  
28 disability. This is because the ADAAA requires courts to determine disability “without  
regard to the ameliorative effects of mitigating measures” such as medication. 29 C.F.R.  
§§ 1630.2(j)(1)(vi) and 1630.2(j)(5)(i).



1 the impairment of a major life activity. . . . Rather, . . . a plaintiff's testimony may suffice  
 2 to establish a genuine issue of material fact.” *Rohr*, 555 F.3d at 858-59 (quoting *Head*  
 3 *v. Glacier Nw. Inc.*, 413 F.3d 1053, 1058 (9th Cir. 2005)). The Court agrees with Plaintiff  
 4 that her testimony, which is not contradicted by Dr. Beckman’s records, is sufficient to  
 5 create a genuine issue of material fact as to whether she has a covered disability under  
 6 the ADA.

## 7                   2.       “Qualified” Individual

8           Defendant next argues that Plaintiff is not a “qualified” individual under the ADA  
 9 because she admits that she was not able to perform the essential functions of her job.  
 10 Defendant asserts that the Court must view Plaintiff’s ability to perform her essential job  
 11 duties at the time she requested accommodation, not at a later time.<sup>8</sup>

12           “An individual is qualified if with or without reasonable accommodation, she can  
 13 perform the essential functions of the employment position.” *Samper v. Providence St.*  
 14 *Vincent Med. Ctr.*, 675 F.3d 1233, 1237 (9th Cir. 2012). “If a disabled person cannot  
 15 perform a job's ‘essential functions’ (even with a reasonable accommodation), then the  
 16 ADA's employment protections do not apply.” *Bates v. United Parcel Service, Inc.*, 511  
 17 F.3d 974, 989 (9th Cir. 2007) (quoting *Cripe v. City of San Jose*, 261 F.3d 877, 884-85  
 18 (9th Cir. 2001)).

19           Defendant cites to Plaintiff’s testimony about her mental state before she was  
 20 taken off work on October 20, 2009, to argue that she admittedly was unable to perform  
 21 her job duties. Plaintiff did testify that as of the morning of October 21, 2009, she did not  
 22 believe she would have been able to perform one of the essential functions of her job,  
 23 which was to be an armed guard. (Dkt. no. 2404 at 45.) However, on that date, Plaintiff  
 24 was told not to show up for her shift but to report for a Fitness for Duty exam on October  
 25 22, 2009. After the exam, Plaintiff was taken off work and was told to consult with her  
 26 physician and report back to the Clinic. By November 4, 2009, the day after the second

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27           <sup>8</sup>Despite this argument, Defendant cites to Plaintiff’s testimony that she  
 28 continued to experience emotional impairment until early 2011.

1 deadline for Plaintiff to report to the Clinic, Plaintiff was feeling better and she felt the  
2 change in her medication had helped her. In fact, Dr. Beckman confirmed that the  
3 medication was beginning to work and released her to return to work starting on  
4 November 5, 2009. Viewing the evidence in the light most favorable to Plaintiff as the  
5 non-moving party, her testimony and Dr. Beckman's release for her to return to work on  
6 November 5, 2009, create a genuine issue of material fact as to whether she was  
7 qualified, with or without reasonable accommodation, to perform her essential job  
8 functions. A reasonable jury may conclude that Plaintiff could perform the essential  
9 functions of her job on November 5, 2009, had Defendant accommodated Plaintiff by  
10 extending her leave until then.

### 11 **3. Causation and Plaintiff's Employment Termination**

12 Defendant argues that Plaintiff cannot show that her employment was terminated  
13 because of disability. The facts relating to this argument are intertwined with  
14 Defendant's cursory claim that it had legitimate, non-pretextual reason for Plaintiff's  
15 termination. Because all three arguments rely on Plaintiff's termination, the Court will  
16 address these issues collectively. The Court finds that the parties' dispute as to the  
17 reason for Plaintiff's employment termination creates a genuine issue of material fact  
18 that precludes summary judgment.

19 Defendant claims Plaintiff's employment was terminated because she did not  
20 report to the Clinic after being given the Second Notice to report on or before November  
21 3, 2009. The Second Notice stated: "failed to check in with clinic on 10-26-09. Must  
22 check in by 11-3-09 with Dr. note." (Dkt. no. 24-9.) Plaintiff admitted she did not report  
23 to the Clinic. However, Plaintiff testified she called the Clinic the day she received the  
24 Second Notice and spoke to the clinic administrator, Patty Cohen, to explain that she  
25 had not seen her personal doctor yet. (Dkt. no. 25-1 at 20.) Ms. Cohen told her to go to  
26 her doctor's appointment and bring the note from her doctor. (Dkt. no. 24-4 at 62.)

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1 According to Plaintiff, Ms. Cohen told her “[d]on’t worry about that date.”<sup>9</sup> (*Id.*; dkt. no.  
 2 25-1 at 19.) She testified that based on this conversation, she did not report to the Clinic  
 3 but went to her doctor’s appointment on November 4, 2009, and then contacted the  
 4 Clinic after this appointment. Defendant argues that Plaintiff twice received notice that  
 5 she must report to the Clinic, but she failed to report as instructed in violation of its “no  
 6 call, no show” policy. Plaintiff’s testimony shows she thought she complied with the  
 7 Second Notice by contacting the Clinic and was told not to worry about the deadline  
 8 since she had not seen Dr. Beckman yet to be able to provide the Clinic with the  
 9 required note from him. Defendant also offered termination letters sent to other  
 10 employees who violated its “no call, no show” policy. (Dkt. no. 24-10.) One of these  
 11 letters, the letter dated July 28, 2009,<sup>10</sup> suggests that Defendant made more attempts to  
 12 contact the employee who missed a Clinic appointment than merely sending a second  
 13 notice. (*Id.* at 5 (letter states in part: “We have made several attempts to contact you  
 14 regarding your missed appointments. All attempts have been unsuccessful.”) In  
 15 Plaintiff’s case, she did not physically report to the Clinic, but she did contact the clinic  
 16 administrator. Under these circumstances, a reasonable jury may find that Plaintiff did  
 17 comply with the Second Notice and Defendant’s reason for terminating her employment  
 18 is a pretext.

## 19 **B. Retaliation**

20 In response to the Motion, Plaintiff contends that she also asserts a claim for  
 21 retaliation, citing to the allegation that she was terminated for exercising her rights under  
 22 the ADA. The Court agrees with Defendant that the Complaint fails to allege a claim for  
 23 retaliation.

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25 <sup>9</sup>Plaintiff testified that Ms. Cohen instructed her not to report to the Clinic, but  
 26 after further examination, she admitted that Ms. Cohen did not specifically say: “Don’t  
 27 show up.” (Dkt. no. 25-1 at 19; dkt. no. 24-4 at 62.) Plaintiff testified that Ms. Cohen did  
 say: “Don’t worry about that date [November 3, 2009].” (Dkt. no. 24-4 at 62.)

28 <sup>10</sup>It is not clear whether the letter was sent in 2009 or 2007 because of the  
 conflicting years in the letter. (Dkt. no. 24-10 at 5.)

1 Fed. R. Civ. P. 8's notice pleading standard requires a plaintiff to "give the  
2 defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell*  
3 *Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotation marks and citation  
4 omitted). While Rule 8 does not require detailed factual allegations, it demands more  
5 than "labels and conclusions" or a "formulaic recitation of the elements of a cause of  
6 action." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*quoting Twombly*, 550 U.S. at 555).

7 The Complaint asserts a single claim for relief under the heading "First Claim for  
8 Relief." The paragraphs under this heading allege disability discrimination. The  
9 allegation that Plaintiff relies on is embedded in a paragraph where she alleges  
10 disability discrimination based on her termination and Defendant's failure to provide  
11 reasonable accommodation. (See dkt. no. 1, ¶ 18.) Plaintiff's Complaint does not  
12 include any reference to retaliation, let alone detailed factual allegations to support this  
13 claim. Plaintiff fails to give fair notice to satisfy Rule 8's requirement that she is also  
14 asserting a separate claim for retaliation.<sup>11</sup> Plaintiff cannot now seek to expand her  
15 Complaint to assert a retaliation claim.

## 16 **V. CONCLUSION**

17 The Court notes that the parties made several arguments and cited to several  
18 cases not discussed above. The Court has reviewed these arguments and cases and  
19 determines that they do not warrant discussion as they do not affect the outcome of the  
20 Motion.

21 It is therefore ordered that Defendant's Motion for Summary Judgment (dkt. no.  
22 24) is denied.

23 DATED THIS 20<sup>th</sup> day of March 2015.

24   
25 MIRANDA M. DU  
UNITED STATES DISTRICT JUDGE

26 <sup>11</sup>The Court need not address Plaintiff's argument that she properly exhausted  
27 her administrative remedies as to her retaliation claim. However, the fact that she did  
28 not allege retaliation in her U.S. Equal Employment Opportunity Commission ("EEOC")  
charge further underscores the need for her Complaint to give fair notice to Defendant  
that she is seeking to assert a claim that was not raised before the EEOC.